

**NAVY HAS NO OBJECTION TO DECLASSIFICATION
 AND RELEASE.**

September 16, 1946

Memorandum concerning the legality of retired naval officers holding civil offices under Federal, State, or Territorial government or employment with private concerns doing business with the Government.

The usual cases of employment of retired officers are covered in this memorandum, which is furnished for information only. The applicable statutes should be referred to in any particular case.

The question as to whether a retired officer may legally accept a civil appointment and still hold his position on the retired list is one of private concern only and not a subject with which the United States can concern itself until some action has been taken by the retired officer. The obvious course for any retired officer called upon to determine that question is to seek the advice of private counsel, since it is one strictly of private concern and in no sense of public interest. (Attorney General's opinion, March 26, 1897, 21 Op. Atty. Gen. 510.)

Under this opinion of the Attorney General, it is not for the Navy Department to decide in any particular case whether the prospective employment of a retired officer would come within the prohibition of any statute.

Unless otherwise provided by law, retired officers in receipt of retired pay are prohibited from holding a civilian position or office with the Federal Government where either the rate of retired pay or the rate of compensation fixed for the civilian position or office amounts to \$2500 per annum unless (1) elected thereto, or (2) appointed by the President with Senate confirmation, or (3) retired because of battle injuries or incapacities incurred in line of duty. (5 U. S. Code, sec. 5-62; 13 Comp. Gen. 60; 21 Comp. Gen. 1129.) Retired officers receiving retired pay in excess of \$2500 per annum may not avoid the application of the foregoing statutory prohibition by retaining their retired office and waiving their retired pay during occupancy of the civilian position or office. (14 Comp. Gen. 289.)

The restriction upon employment discussed in the previous paragraph does not preclude the employment of retired officers of the Navy to engage in work under the direction of the Chief of Engineers of the United States Army in connection with the improvement of rivers and harbors of the United States. (5 U. S. Code, 63.) Nor is there any prohibition against the appointment of retired officers of the Navy to positions in the Library of Congress or to positions as Director or

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Assistant Director of the Bureau of the Budget. (5 U. S. Code, secs. 64, 65; 31 U. S. Code, sec. 16.) Retired officers of the Navy may accept appointments to positions in the diplomatic or consular branches of the Foreign Service of the United States (34 U. S. Code, sec. 226) and appointments to positions in the Veterans Administration. (Act of 10 August 1946 - Public Law 718 - 79th Congress.)

Although a retired officer of the Navy may be eligible for employment in a Federal civilian position, he will, upon acceptance of such position, be subject to the dual compensation statute (5 U. S. Code, sec. 59a), which limits the aggregate income from a Federal civilian position, whether elective or appointive, and retirement pay, to an amount not to exceed \$3000 per annum. For discussion, see paragraph 2, page 3.

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Naval appropriations are not available for the pay of any officer on the active list who is employed by any person or company furnishing naval supplies or war material to the Government, and any such employment would be unlawful; nor are naval appropriations available for the pay of any retired officer who for himself or for others is engaged in selling or contracting or negotiating for the sale of naval supplies or war material to the Navy or to the Navy Department. (Act of June 10, 1896, 29 Stat. 361, as amended by sec. 9, Act of July 22, 1935, 49 Stat. 490; 34 U. S. Code, sec. 883.)

Persons or firms that furnish plans, specifications, designs or drawings for the Navy "are commonly understood as being engaged in the furnishing of professional services, and clearly professional services are not 'naval supplies or war materials' within the accepted meaning of that term". (Comp. Gen. B-12238, Nov. 7, 1940.)

Under sections 41 and 109, Criminal Code, a retired officer is forbidden to represent the United States in the transaction of business with companies or firms in which he has a direct or indirect pecuniary interest or to assist in the prosecution of claims against the United States. (Act of Mar. 4, 1909, 35 Stat. 1097, 1107; 18 U. S. Code 93, 198.)

Retired officers while not on active duty are permitted to receive compensation for services rendered to or in behalf of any person, in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter or thing in which the United States is a party or directly or indirectly interested, before any department, court-martial, bureau, officer, or any civil, military, or naval commission, provided he does not represent any person in the sale of anything to the Government through the department in whose service he holds a retired status. (Sec. 113, Criminal Code, Act of Mar. 4, 1909, 35 Stat. 1109, as amended by Act of October 8, 1940; 18 U. S. Code 203.)

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Section 27 of the Surplus Property Act of 1944, approved October 3, 1944 (58 Stat. 765, 781), provides that "No person employed by any Government agency, including commissioned officers assigned to duty in such agency, shall, during the period such person is engaged in such employment or service, or for a period of two years after the time when such employment or service has ceased, act as counsel, attorney, or agent, or be employed as representative, in connection with any matter involving the disposition of surplus property by the agency in which such person was employed, if such person during his employment with such agency ratified, approved, or authorized the disposition of any surplus property pursuant to the provisions of this Act or recommended any such approval, authorization, or ratification as part of his official duties. Any person violating the provisions of this section shall be fined not more than \$10,000, or imprisoned for not more than one year, or both."

Where a retired officer has qualified for and accepted appointment to a civilian office or position under the Federal Government or the municipal government of the District of Columbia, or under any corporation the majority of the stock of which is owned by the United States, the combined rate of his compensation in such civilian office or position and his retired pay for or on account of commissioned services is limited by law to \$3,000 per annum, but if the retired rate of pay exceeds \$3,000, then the retired officer can only receive one pay and must therefore elect whether he will continue to receive his retired pay or the pay of the civilian office or position. Should he give up his retired pay while holding a civil office or position, he may again receive his retired pay when he relinquishes his civilian office or position. (Act of June 30, 1932, sec. 212, 47 Stat. 406, as amended by Act of July 15, 1940, sec. 3, 54 Stat. 761; 5 U. S. Code, sec. 59a.) An officer receiving retired pay of \$2,900 per annum and employed in a civilian office or position with a salary of \$2,800 per annum would be paid at a net rate of \$3,000 per annum. (12 Comp. Gen. 37, 47.)

The inhibition of subparagraph (a) of section 212, Act of June 30, 1932, supra, limiting the combined rate of compensation to \$3,000 per annum, "is not against the retaining of the retired status but is that 'no person holding a civilian office * * * shall be entitled, during the period of such incumbency, to retired pay from the United States * * * as a commissioned officer.' Also, that the right of election given under the statute is not as to whether he shall continue to hold the civilian office or position or to continue to hold his retired status, but is as to whether he shall accept the pay of the one or the pay of the other." (Comp. Gen. Aug. 9, 1932, A-43761)

Commissioned officers who have been "retired for disability incurred in combat with an enemy of the United States", or pursuant to the Act of July 15, 1940 (54 Stat. 761; 38 U.S.C., sec. 582b) "for disabilities

resulting from an explosion of an instrumentality of war in line of duty during an enlistment or employment as provided in Veterans Regulation Numbered 1(a), part I, paragraph I", are excepted from the requirements of said section 212. The first quoted clause has been defined by the Comptroller General to apply to officers "retired for disability the direct result of injury from the instrumentalities of war employed by the enemy in combat with the forces of the United States," as, for example, where the disability necessitating retirement was directly due to inhaling poison gas during combat with an enemy of the United States. (Comp. Gen., Jan. 3, 1933, A-44756.)

Reserve officers, while employed on active duty, may be paid compensation by any person, firm, or corporation, provided that, prior to commencement of active duty, they were receiving compensation from such person, firm, or corporation. (Selective Training and Service Act of 1940, sec. 3(f), approved Sept. 16, 1940, 54 Stat. 887; 50 U.S.C. War, Appendix, sec. 303.)

EMPLOYMENT IN FIRMS DOING BUSINESS WITH THE FEDERAL GOVERNMENT.

OPINIONS

The Judge Advocate General has rendered advisory opinions as to what employment a retired officer of the Navy may legally accept with private firms doing business with the Government. Some of these opinions are as follows: A retired officer may be employed by the merchant marine; by a steamship company having mail contracts with the Government and by a steamship company enjoying certain Government loans for the construction of its ships. It was pointed out that the foregoing was a very general statement of the law on the subject and "would very possibly require exceptions or modifications to meet the facts of specific cases as they arise." (C.M.O. 2-1931, 14.) A retired officer may not participate in bids for subscriptions to magazines for vessels of the Navy under "Welfare and Recreation", one of the regular appropriations for the naval service. (C.M.O. 2-1935, 25.) In time of peace a retired officer may be employed under contract by the Navy Department as consultant. "While the Judge Advocate General is of the opinion that a contract for a retired officer's services under the above-stated conditions would be legal, there are decisions of the Comptroller General which would appear to hold to the contrary." (C.M.O. 11-1937, 27.) A retired officer may be employed on merchant vessels entering ports of belligerent countries. (C.M.O. 2-1939, 276.) The Neutrality Act, approved Nov. 4, 1939, made such employment unlawful until 4:30 p. m. E.S.T., Nov. 17, 1941, at which time, those sections of the Neutrality Act making such employment unlawful were repealed.) A retired officer may not accept an office from a foreign

government without the consent of Congress in view of Article I, Section 9, clause 8, of the Constitution. (C.M.O. 3-1934, 13.) He may not accept employment with a foreign government, (C.M.O. 1-1942, 258) nor may he be employed in the armed forces of a foreign state. (C.M.O. 4-1942, 116.)

The question of whether the treasurer of a corporation, a retired officer, is engaged in the selling of, contracting for the sale of, or negotiating for the sale of, to the Navy or the Navy Department, any naval supplies or war material within the statute (Act of June 10, 1896, as amended, supra) is one of fact not for consideration by the Judge Advocate General. (C.M.O. 5-1939, 9.) The question of the legality of the appointment of a retired officer as a member of a local board is primarily one for determination by the appropriate Selective Service authorities. (C.M.O. 1-1941, 186.) The Navy Department has not issued and does not contemplate the issuance of rules and regulations relative to the practice of law by retired officers before Government agencies. (C.M.O. 1-1941, 179.) A retired officer may be required to perform jury duty by a state provided he is not performing Federal service which would be interfered with or obstructed by jury duty. (C.M.O. 1-1944, 118.)

"There is no general law which makes it illegal for a company in which a Government official is a stockholder and an officer to bid on and receive Government contracts for services or supplies from a department other than the one in which the official is functioning." (1929 L.R.M.A. 384.) There is no legal objection to a firm, owned by a retired officer of the Naval Reserve who is on the honorary retired list of the Naval Reserve without pay, bidding on a Navy contract for the sale of medical supplies to the Navy. (C.M.O. 3-1943, 101.)

A retired officer may enter into contracts for the purchase of Navy Surplus materials. "However, aside from any statutory prohibition, contracts between the Government and its employees are open to criticism for possible favoritism and preferential treatment; and this office (Comptroller General) often has expressed the view that such contracts should not be made except for the most cogent reasons." (C.M.O. 1-1944, 200, See also C.M.O. 2-1938, 181 and footnote 32 same case.)

Section 9 of the Hatch Act (18 U. S. Code 61h) which restrains political activities of any person or officer employed in the executive branch of the Federal Government does not apply to retired officers of the Army and Navy. (C.M.O. 2-1939, 284; Justice ltr to Capt. G. M. Adce, USN, Ret., Oct. 3, 1939; Atty. Gen. ltr to SecNav., Apr. 26, 1940, Navy Dept. File OR/P9-1(390109).) The Surplus Property Act of 1944 (50 U. S. Code, War Appendix, Supp. V, 1636) is applicable to retired officers of the Navy. (C.M.O. 3-1945, 133.) Accordingly, retired officers of the Navy who have been assigned to a Government agency or department and who, during such assignment, have certified, approved or authorized the disposition of surplus property may not for a period of two years after the

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termination of such assignment act in any representative capacity in connection with the disposition of surplus property by the agency to which he had been so assigned.

EMPLOYMENT BY FOREIGN FIRMS

In addition to the foregoing statutory restrictions on the civil employment of retired officers they must also govern themselves by the terms of Executive Order Number 5221 of November 11, 1929, which provides as follows:

"It is hereby ordered that no officer or employee in the executive branch of the United States Government, regardless of whether he is on annual leave or leave without pay, shall be employed with or without remuneration by any foreign corporation, partnership, or individual that is in competition with American industry."

O. S. CONNOLLY
Judge Advocate General of the Navy